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IN THE

Supreme Court of the United States

October Term 1976

Number 76-66

PAT HALL
and
BOBBY JAMES LAWSON
Petitioners

-vs-

STATE OF GEORGIA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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The Petitioners herein pray that a Writ of Certiorari issue to review the judgment of the Georgia Supreme Court entered in the above-entitled case on April 20, 1976.

OPINION BELOW

A copy of the opinion of the Georgia Supreme Court is annexed hereto as an appendix to this Petition.

The opinion of the Georgia Supreme Court affirmed the convictions of the Petitioners for Communicating Gambling Information in violation of Ga. Code § 26-2706.

JURISDICTION

The judgment of the Georgia Supreme Court was entered on April 20, 1976. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

QUESTION PRESENTED FOR REVIEW

Does the failure of Georgia's wiretap law (Ga. Laws 1968, pp. 1249, 1328; 1972 pp. 615, 952, 953) to conform substantially to the federal wiretap law (18 U.S.C. § 2510-2520), invalidate any electronic surveillance conducted thereunder, thus rendering Georgia's wiretap law facially deficient?

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT IV

The right of the people to be secure in their persons, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The Petitioners were arrested and charged with the felony of Communicating Gambling Information.

The Petitioners made a Motion to Suppress based, inter alia, on the unconstitutionality of the Georgia Wiretap Law. That Motion was denied.

At the Petitioners' trial, evidence obtained from the wiretap was admitted over objection. The Petitioners were convicted and each sentenced to five (5) years in

prison, together with a five thousand dollar ($5,000.00) fine.

Because the issue involved the constitutionality of a Georgia law, appeal was taken directly to the Georgia Supreme Court. The Court affirmed, and denied application for rehearing on May 4, 1976.

THE GEORGIA WIRETAP LAW IS FACIALLY INSUFFICIENT AND HENCE PROVIDES NO LEGITIMATION FOR ANY WIRETAP.

The law which the Petitioners challenge is the Georgia Wiretap Law (as amended), Ga. Laws 1968, pp. 1249, 1328; 1972 pp. 615, 952, 953. For convenience, that law is referred to hereinafter as codified: Ga. Code § 26-3004.

PRE-EMPTION

In passing 18 U.S.C. §§ 2510-2520, Congress pre-empted the area of wiretapping. Title 18 U.S.C. § 2516 (2) provides that states may pass eavesdropping laws, but the legislative history requires them to be in substantial compliance with the federal law.

> "No authorization may be permitted unless a specific state statute permits it. The state statute must meet the minimum standards reflected as a whole in the proposed chapter. The proposed provision envisions that states would be free to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation . . . ."
>
> Senate Report No. 1097, U.S. Code Cong. & Adm. News, p. 2187 (1968).

Superficially, the Georgia law appears substantially to conform to Title III. However, read more carefully, and compared with the federal law, the cases, and the Fourth Amendment, it is deficient.

While there are several areas of variation, four are of substance.

1) *Other Investigative Techniques.*

Title 18 U.S.C. § 2518 (1) (c) requires:

> "*A full and complete* statement as to whether or not other investigative procedures have been tried and failed or why they *reasonably appear to be unlikely to succeed* if tried or *to be too dangerous.*" [Emphasis added].

The Georgia law requires that a wiretap be undertaken only on probable cause. It also requires exigencies which "override the need for giving of notice of the surveillance to the parties to be overheard . . . ." Ga. Code § 26-3004 (d).

What it does not do is to require a finding that the *tap itself* is necessary. There is nothing whatever in the Georgia law to forbid a policeman with minimal probable cause to conduct his investigation solely by wiretap.

The entire rationale behind Title III is that wiretapping contains such potential for abuse that its use must be permitted only where absolutely necessary. As Mr. Justice Clark stated in one of the landmark cases in the area, *Berger v. New York,* 388 U.S. 41, 63 (1967):

> "Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices."

Except for a preliminary finding of "probable cause," however, the Georgia law permits the use of wiretap as the initial step in an investigation, and requires no justification for using this extreme step instead of conventional techniques.

2) *Previous Applications.*

Title 18 U.S.C. § 2510 (1)(e) requires:

> "A full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept . . . communications involving any of the same persons . . . specified in the application . . . . "

The importance of this requirement is set out in the next paragraph. However, there is no similar requirement in the Georgia law.

The reason for this requirement is to insure full disclosure by the police. Since telephone communications often involve several distinct (e.g., county and county) or overlapping (e.g., federal and state) jurisdictions, there often exist many judges from whom an application could be sought. Under the federal law, a magistrate has to know about earlier orders of authorization or of denial. The Georgia law, however, permits a sort of "magistrate shopping," whereby an applicant can continue applying until he finds a friendly judge. He does not have to make known to him earlier attempts by the applicant or his colleagues to obtain permission to tap. Nor does he have to make known the existence of earlier wiretaps.

While this does not create the "lie to the issuing magistrate" condemned in *United States v. Thomas,* 489 F. 2d 664 (5th Cir. 1973), it does permit a less than candid application.

In short, the Georgia law allows the police to make continued applications, and have a chance of obtaining an order of authorization from a magistrate not fully aware of all surrounding circumstances.

3) *Other Offenses.*

Title 18 U.S.C. § 2517 (5) provides:

"That when an investigative or law enforcement officer, while engaged in intercepting wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom . . . may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on *subsequent application* that the contents were otherwise intercepted in accordance with this chapter." [Emphasis added].

Subsection (2) permits the use of intercepted conversations in court proceedings.

The Georgia law is explicitly contrary to the federal law in this respect. It provides that when an officer conducting a tap obtains information of other crimes, that evidence "may be disclosed or used in the same manner as if a surveillance warrant covering said crimes had initially been used." Ga. Code § 26-3004 (g).

This situation, like (2) above, provides the police with too much power. They are able to wiretap, and use the evidence obtained almost indiscriminately. In particular, they do not have to go back before a magistrate to show that the wiretap was made in good faith, that the second crime was not actually the target initially, and again, in short, that the magistrate was not misled

4) *Notice.*

Title 18 U.S.C. § 2518 (8)(d) requires that:

"Not later than ninety days after the filing of an application for [a wiretap] which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application . . . an inventory which shall include notice of (1) the fact of the entry of the order or the aplication; (2) the date of entry and the period of authorized, approved or disapproved interception, or the denial of the application; and (3) the fact that during the period wire or oral communications were or were not intercepted."

The Georgia law (Ga. Code § 26-3004(5) does not require any prompt notice. A person who is *indicted* or *accused* is to be notified by the solicitor general that his conversations have been intercepted. This procedure leaves room for very great and improper invasions of privacy.

First of all, a person may not be indicted for a year or more after the tap. Yet the Georgia law allows the interception to be used against him, even though he is unaware of its existence until after indictment.

A corollary to the above is that a person who is not indicted may *never* be aware that his privacy has been invaded.

Finally, a person against whom an application is made and denied has no right to notice under the Georgia law.

The Congress felt that an invasion or attempted invasion of a person's privacy is of such importance that he is entitled to know about it. The Georgia legislature, however, did not enact similar safeguards in its law.

EFFECT OF THE GEORGIA LAW

The variance between the Georgia law and the federal law is subtle, but very real. The federal law was passed largely in response to three decisions of this Court: *Berger v. New York,* supra; *Katz v. United States,* 389 U.S. 347 (1967); and *Osborn v. United States,* 385 U.S. 323 (1966). These cases, in turn, hinged on the Fourth Amendment.

The great flaw in Georgia's statute is that it provides the police with too much possibility for abuse of the very powerful, but potentially very dangerous, use of wiretaps.

It is hard to summarize the entire thrust of this Brief in one line. However, Mr. Justice Brennan's language, although in the context of arrests rather than searches, comes very close. His warning is "that it is imperative that the delibrate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . . " *Wong Sun v. United States,* 371 U.S. 471 481-482 (1963).

CONCLUSION

Your Petitioners believe that the Georgia wiretap law is illegal. Accordingly, it is prayed that this Court will grant a Writ of Certiorari so that they can present further authority in support of their proposition.

Respectfully submitted,

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APPENDIX A

Supreme Court of Georgia Decided: Apr. 20, 1976

30939. LAWSON et al. v. THE STATE

UNDERCOFLER, Presiding Justice.

Appellants were convicted in a non-jury trial on two counts of communicating gambling information. Each appellant was sentenced to two five-years terms to run concurrently. Certain evidence was obtained under a telephone intercept order. This appeal asserts that the trial court erred in refusing to suppress all evidence derived from the telephone intercept order, the admission of certain evidence, and the denial of appellants' motions for directed verdicts. The appeal attacks also the constitutionality of Ga. L. 1968, pp. 1249, 1328 as amended, Ga. L. 1972, p. 615, and Ga. L. 1972, pp. 952, 953 (Code Ann. §26-3004) because it fails to meet the requirements set out by the United States Congress in 18 USC §§ 2510-2520.

The telephone intercept order was issued on September 23, 1974, by a judge of the superior court upon the affidavit of an agent of the Georgia Bureau of Investigation. The order authorized the interception of communications over two telephones for a 20 day period. The wiretap began on September 24, 1974, and terminated on September 26, 1974. Thereafter the judge issued two search warrants based upon the intercepted communications. HELD:

1. Appeallants contend the intercepted communications should have been suppressed because the State failed to comply with the "necessity" requirements of

18 USC § 2518 (1) (c) and § 2518 (3) (c). These sections provide respectively that an application for an order authorizing a telephone interception shall include, "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," and, "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." Appellants argue that the statements in the GBI agent's affidavit as to necessity are stereotyped recitals and fail to satisfy the statute. *We do not agree.* The affidavit shows in detail a physical surveillance of the purported gambling establishment and of the defendants over a period of two weeks prior to the issuance of the telephone intercept order. The affiant shows from prior experience that the full extent of an illegal gambling operation as here, and the individuals involvement therein cannot be obtained by normal investigative techniques. In our opinion the trial court was authorized to rely upon these representations. As stated in *United States v. Robertson,* 504 F2d 289, 293 (3), "We first note that §§ 2518 (1)(c) and (3)(c) must be read in a common sense fashion. They are 'simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime.' *United States v. Kahn,* 1974, 415 U. S. 143, 153 n. 12, 94 SC 977, 983 n. 12, 39 LE2d 225, 236 n. 12. Their purpose 'is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use

of conventional techniques.' *United States v. Pacheco,* 5th Cir. 1974, 489 F2d 554. The provisions contemplate that 'the showing be tested in a practical and commonsense fashion.' "

2. Appellants contend there was an unauthorized publication and disclosure of the contents of the communications obtained under the intercept order. It argues that duplicated tapes of the intercept conversations were made in apparent disregard of the judge's order that such communications and the tapes thereof were to be kept confidential and delivered to the clerk of the court. We find no error. The record shows that the judge who issued the telephone intercept order approved the making of duplicate tapes and transcripts thereof in order to comply with Federal and State laws. See 18 USC § 2517 (1) and (2). The duplicate tapes were given to a secretary to transcribe. The duplicate tapes were then erased and the tapes delivered to the judge who issued the intercept order. The judge kept them in his personal possession until the hearing on the motion to suppress when they were delivered to the district attorney.

3. In our opinion the evidence shows that the officers conducting the telephone interceptions did so in such a way as to minimize the interception of communications not subject to the order. The record shows the interceptions were terminated on a number of personal and nonrelevant conversations. The interceptions were authorized for a 20 day period, however, they were terminated after two days.

4. The failure to advise the judge issuing the telephone intercept order of a previous interception in

October 1973 was harmless. The judge was informed of previous telephone intercepts but not specifically this particular one.

5. We find no merit in appellants' contentions that the affidavit in support of the issuance of the telephone intercept order contained false material representations. These contentions involve the credibility of witnesses and the decision of the trial judge will not be reversed.

6. Appellants content that Code Ann. § 26-3004 is unconstitutional because it does not meet the minimum standards of Title III of the Omnibus Crime Control Act of 1968 (18 USC § 2510, et seq.). Appellants argue that Code Ann. § 26-3004 omits the provision of 18 USC § 2518 (6) which states: "Whenever an order authorizing interception is entered pursuant to this chapter the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require." This provision is discretionary and not mandatory. The fact that it is not included in the Georgia statute does not render it unconstitutional or in conflict with the federal provision.

7. Appellants have no standing to challenge the Georgia statute because it does not provide that the application for an intercept order contain a statement as to the period of time the interception is required to be maintained, that it must not be longer than necessary to achieve the objective, that other investigative procedures have failed, that the judge make a

finding that other investigative procedures have failed, and require that the person named in the intercept order be given reasonable notice thereof after the surveillance. All of these requirements were complied with and the appellants show no harm.

8. The trial court did not err in denying appellants' motion for directed verdicts.

9. Evidence that a particular phone was registered to one of the appellants was admissible. Code Ann. § 38-711.

10. During the hearing on the motion to suppress appellant Hall admitted to being a lottery operator. She claims this testimony was necessary to support her motion to suppress. During the trial upon motion by the district attorney the court took judicial notice of her testimony that she was involved in lottery operations. Appellant Hall complains that this is a violation of her Fourth Amendment rights. See *Simmons v. United States*, 390 U. S. 377 (SC , LE2d) (1968). This case was tried by the judge without a jury and the judge had already heard the admission when hearing the motion to surpress. Assuming but not deciding that appellant Hall's Fourth Amendment rights were violated a review of the record convinces us that any such violation was harmless beyond a reasonable doubt.

Judgment affirmed. All the Justices concur.

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Petition for a Writ of Certiorari to the Georgia Supreme Court were mailed to:

Hon. Arthur K. Bolton
Attorney General
132 State Judicial Building
40 Capitol Square
Atlanta, Georgia 30334

and

Hon. Ben J. Miller
District Attorney
P. O. Box 307
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with sufficient postage thereon to insure delivery by first class mail.

This 14th day of July, 1976.

/s/ HERBERT SHAFER
HERBERT SHAFER
Attorney for Petitioners

/s/ BERNARD H. DEMPSEY, JR.
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